United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7181

To be argued by
ROBERT GOLDSTEIN

United States Court of Appeals

For the Second Circuit

Docket No. 77-7181

ALLEN BREISBLATT, PAULA BREISBLATT, THOMAS A. OLSEN, DEBRA E. OLSEN, JAMBERT W. HOLST, DOROTHY MOBLEY, RICHARD A. HEAVENKA, JUDITH HEAVENKA, THORTON McCOY and EDNA McCOY,

Plaintiffs-Appellants,

v.

BAKER-FIRESTONE, INC. and EDWIN J. GEHER,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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TABLE OF CONTENTS

Brief

	Page
Facts	1
Relevant Statute	2
Issue of This Appeal	2
Argument:	
Point I. Section 44 of the Internal Revenue Code, and the specific regulations under Section 44, require that the specific residence purchased by a buyer be at the lowest price that the specific residence was offered for sale after February 28, 1975. The law does not state that if, after the buyer signed contract with seller, the offering price of a similar or comparable residence is lowered, then the contract between the buyer and seller must be amended to contain a lower price	3
Point II. Most of plaintiffs-appellants' arguments are correct. However, their conclusion is wrong	8
Point III. Defendants-Appellees' position conforms to the legislative purpose behind Section 44, while the position of plaintiffs-appellants is contrary to Section 44's legislative purposes	11
Conclusion	15

Table of Citations

Codes Cited:

	Page
Title 26 U.S.C. Sec. 44 (Internal Revenue Code) (1954)	2,4
I.R.C. Regs. Sec. 1.44-2(c).....	6
I.R.C. Regs. Sec. 1.44-3(b).....	6
I.R.C. Regs. Sec. 1.44-3(c)(1).....	6
I.R.C. Regs. Sec. 1.44-3(c)(3).....	6
I.R.C. Regs. Sec. 1.44-5(f).....	7

Literature Cited:

I.R.C. Guidelines TIR-1360.....	4,5
C.C.H., Vol. 1, 1976, para. 1409.....	5
Report of the Committee of Finance, United States Senate, on H.R. 2166.....	11

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THORTON McCOY and EDNA McCOY,

Appellants,

- against -

BAKER-FIRESTONE, INC. and EDWIN J.
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Appellees.

APPELLEES' BRIEF

FACTS

The facts have been stipulated by the parties and are contained in the Stipulation of Facts signed by the attorneys for all parties. The stipulation is set forth in the Joint Appendix.

The crux of the facts are as follows:

(a) Between November 1, 1974 and February 15, 1975, the plaintiffs-appellants contracted to buy condominium units from the defendant-appellee, Baker-Firestone, Inc. It is agreed that Baker-Firestone had not offered these units for sale at any lower price.

(b) Subsequent to the signing of all of the contracts involved herein, Baker-Firestone advertised that if anyone contracted to buy other condominium units during a 90-day

period, Baker-Firestone would pay one year's common charges for those purchasers.

(c) All contracts with the plaintiffs-appellants were closed at the contract price. Baker-Firestone did not pay one year's common charges for the units which were contracted for prior to the advertisement.

RELEVANT STATUTE

This case involves Section 44 of the Internal Revenue Code which grants tax credits to purchasers of new residential construction. In particular, the case involves an interpretation of Section 44(e)(4)(B) which states that there must be a certification that "the purchase price of the residence is the lowest price at which the residence was offered for sale after February 28, 1975."

ISSUE OF THIS APPEAL

If a purchaser and seller of new residential construction contract for a residence at the lowest price at which the residence has ever been offered for sale up to the date of the contract, is the seller forbidden from subsequently selling comparable residences to others at lower prices? Or, does the statute require the seller to refund money to earlier purchasers if the seller sells comparable units to others at lower prices?

POINT I

SECTION 44 OF THE INTERNAL REVENUE CODE, AND THE SPECIFIC REGULATIONS UNDER SECTION 44, REQUIRE THAT THE SPECIFIC RESIDENCE PURCHASED BY A BUYER BE AT THE LOWEST PRICE THAT THE SPECIFIC RESIDENCE WAS OFFERED FOR SALE AFTER FEBRUARY 28, 1975. THE LAW DOES NOT STATE THAT IF, AFTER THE BUYER SIGNED CONTRACT WITH THE SELLER, THE OFFERING PRICE OF A SIMILAR OR COMPARABLE RESIDENCE IS LOWERED, THEN THE CONTRACT BETWEEN THE BUYER AND SELLER MUST BE AMENDED TO CONTAIN A LOWER PRICE.

The defendants-appellees contend that on the facts as stipulated, this case should be dismissed as a matter of law. Baker-Firestone sold newly constructed residences to the plaintiffs-appellants at the lowest purchase prices at which each unit was offered for sale before or after February 28, 1975. The units purchased by the plaintiffs-appellants were never offered for sale to anybody at lower prices than those set forth in the respective contracts. After the plaintiffs-appellants signed their respective contracts, their units were never offered for sale again at any price, higher or lower, since the units were taken off the market upon the signing of the contracts. Each unit purchased by a plaintiff-appellant was, in fact, only offered for sale at one price - the price which was set forth in the offering plan and the contract. The units purchased by the plaintiffs-appellants were never offered for sale at any other price. The advertisement which appeared subsequent to the signing of all the contracts involved herein did not and could not apply to the units which the plaintiffs-

appellants purchased since those units were already under contract.

The plaintiffs-appellants' entire argument is based on the subsequent offering for sale by Baker-Firestone of "comparable" or "similar" or "identical" units with an abatement of carrying charges. Assuming that such an abatement is an offering for sale at a lower price, it still is not an offering for sale of the units which had been previously contracted for by the plaintiffs-appellants. Plaintiffs-appellants are asking this court to read Section 44(e)(4)(B) as if it was worded, "the purchase price of the residence is the lowest price at which the residence or any comparable or similar or identical residence was offered for sale after February 28, 1975."

Section 44(e)(4)(B) states, "the purchase price of the residence is the lowest price at which the residence was offered for sale after February 28, 1975." (Underlining is defendants-appellants') Therefore, Section 44, on its face, talks only about the residence being offered for sale, and in no way extends this doctrine to "identical" or "similar" or "comparable" residences. Had Congress intended to prevent future price reductions in developments, then Congress could have added words such as "similar" or "identical" or "comparable" to the statute to make its intent clear. What Congress did, however, was simply address itself to the purchase price of "the residence" which was being sold.

The Internal Revenue Service Guidelines do not deal at all with "similar" or "identical" or "comparable" residences.

On page 1 of the guidelines (TIR-1360), five conditions are set up for the tax credit. Condition No. 5 states "that the purchase price is the lowestprice at which the residence was ever offered for sale." This identical wording is used in the first paragraph on page 3. Nowhere in the guidelines is there anything dealing with "identical" or "similar" or "comparable" residences.

Commerce Clearing House, Volume 1, 1976, paragraph 1409 analyzes Section 44 of the Internal Revenue Code. Paragraph 1409N deals with requirements for certification regarding the tax credit. It states: "to be eligible for the 5% credit on new housing, the taxpayer must attach to his income tax return a certification by the seller that the purchase price paid by the taxpayer is the lowest price at which the new residence was offered for sale after February 28, 1975." Again, as in the guidelines, Commerce Clearing House makes no attempt to apply Section 44 in cases of "similar" or "identical" or "comparable" residences.

Regulations have been issued by the Internal Revenue Service dealing with Section 44. These regulations are found in Reg. Sec. 1.44-1 and following. If it was the position of the Internal Revenue Service that eligibility for a tax credit had to take into consideration the sale of "identical" or "similar" or "comparable" units, then the Internal Revenue Service coul have spelled this out in the regulations by stating such plainly or by example. Complete reading of the

regulations shows that the Internal Revenue Service deals only with the particular residence being sold.

In Reg. Sec. 1.44-2(c), the language reads in part "the new principal residence must be acquired by the taxpayer under a bidding contract entered into by the taxpayer before January 1, 1976."

Reg. Sec. 1.44-3(b) deals with the form of the certification. Part of that language states "this residence has not been offered for sale after February 28, 1975 in a listing, written private offer, or an offer by means of advertisement at a lower purchase price than the price at which I sold the residence." Again, the certification requires no statement dealing with the sales price of any other residence. The regulation refers only to "this residence".

Reg. Sec. 1.44-3(c)(1) spells out the "offer to sell". It states, "an offer to sell is limited to an offer to sell a specified residence at a specified purchase price". If Baker-Firestone offers units for sale at a specified price, and a buyer selects a specified unit at the specified price and contracts to buy same and does buy same at the specified price, then that specified unit has never been offered for sale at less than the specified price. Upon signing of the contract, the unit is taken off the market and not offered again for sale unless there is a breach of contract, which did not occur herein.

Reg. Sec. 1.44-3(c)(3) also refers to an offer to sell a specified residence.

Reg. Sec. 1.44-5(f) states that "the term 'lowest offer' means the lowest price at which the residence was offered for sale after February 28, 1975."

Baker-Firestone has conformed to Section 44 and to the regulations under that section. It offered residences for sale at a fixed price. This was the only price that the residences were ever offered for sale. Plaintiffs-appellants contracted to buy specific residences at those prices and, in fact, did buy at those prices. The residences that plaintiffs-appellants purchased had never been, and were never again, offered for sale at any price, lower or higher.

The fact that other residences, albeit similar or comparable, were later offered for sale at lower prices reflects a marketing condition -- not a violation, or avoidance, or evasion of any law. Plaintiffs-appellants have not cited one statute or regulation which forbids a seller from offering other units for sale at lower prices after contracting to sell some units, while defendants-appellees have shown that the law requires an analysis of the offering price of each unit that each plaintiff-appellant bought. The question is whether each plaintiff-appellant purchased their residence at the lowest price that their residence was ever offered for sale. The answer is "yes".

POINT II

MOST OF PLAINTIFFS-APPELLANTS' ARGUMENTS ARE CORRECT HOWEVER, THEIR CONCLUSION IS WRONG.

Point I of the plaintiffs-appellants' brief is not contravertial. Everyone agrees that the plaintiffs-appellants are entitled to their tax credit.

The body of Point II is also not in dispute, although the heading is controverted by the defendants-appellees. There is little doubt that the selling price can be reduced by offering to pay a buyer's mortgage payments. By analogy, Baker-Firestone reduced the selling price by offering to pay the buyer's carrying costs. The issue, however, is really not whether Baker-Firestone reduced the selling price. The issue is whether or not Baker-Firestone reduced the selling price on the units purchased by the plaintiffs-appellants.

Again, the body of Point III is really not an arguable point. Builders can sell by model, and Baker-Firestone did sell by model. The fact is that Baker-Firestone offered to sell plaintiffs-appellants their units by showing them models. Subsequent to the time that the plaintiffs-appellants contracted to buy, Baker-Firestone offered to sell other units, albeit comparable units, at lower prices by showing the same models. Baker-Firestone did not offer to sell the same units that plaintiffs-appellants selected at lower prices.

The defendants-appellees do not disagree with the major

argument in Point IV, only with the conclusion drawn from this point. Defendants-appellees admit that title passes at closing and not on contract. Defendants-appellees admit that plaintiffs-appellants did not become owners until after the advertisement in question had begun to run, but defendants-appellees dispute the significance of this admission. The statute in question deals with offers to sell. Nothing in the statute or the regulations states that a seller cannot offer to sell comparable units to others at lower prices before title passes on units under contract.

The plaintiffs-appellants' position seems to be that Baker-Firestone could have offered to sell comparable units at lower prices after they had closed title with the plaintiffs-appellants; But, the plaintiffs-appellants argue that Baker-Firestone cannot make such an offer while there are contracts in existence that are unclosed. This is palpably illogical. Plaintiffs-appellants' argument is that if a builder wants to lower prices, he can do so by first closing on all outstanding contracts. Then he can reduce prices on unsold units. What statutory purpose is served by allowing this, but preventing the reduction of prices on unsold units while contracts are still unclosed? Section 44 was passed by Congress to encourage the purchase of newly constructed residential units because of an existing glut on the market. The plaintiffs-appellants' interpretation of the statute would continue the glut rather than reduce it.

The issue of the closing of title has been introduced by plaintiffs-appellants without any statutory or regulatory support. The statute and the regulations speak only of offerings. The reason plaintiffs-appellants introduced this argument is that without it their position would be that once a builder offers new residences for sale, he can never raise or lower prices without eliminating the Section 44 credit.

As will be shown more fully in Point III, the purpose of Section 44(e)(4)(B) is to prevent increases in price because of the availability of the tax credit -- not to prevent reductions. Plaintiffs-appellants' position would amount to a tax credit section imposing total price control on new housing. Therefore, plaintiffs appellants discuss closing of title as a cut-off date and contend that once contracts are signed, all prices are fixed until all outstanding contracts are closed. Even this position makes no sense since it would involve taking all housing off the market until all outstanding contracts are closed. This would make the Section 44 tax credit a deterent to sales -- not the incentive it was intended to be.

POINT III

DEFENDANTS-APPELLEES' POSITION CONFORMS TO THE LEGISLATIVE PURPOSE BEHIND SECTION 44, WHILE THE POSITION OF PLAINTIFFS-APPELLANTS IS CONTRARY TO SECTION 44's LEGISLATIVE PURPOSES.

The reasons behind the enactment of Section 44 were to remedy the sluggishness in sales of new residential housing and to increase employment in the construction industry. The Report of the Committee of Finance, United States Senate, on H.R. 2166 (Tax Reduction Act of 1975) states in part:

> "The current weakness in the economy is centered disproportionately on the housing industry. Housing starts have declined from a level of approximately 2.4 million units in 1972 to a level of approximately 1.4 million units in 1974. This decline has created severe unemployment problems among the various construction trades and industries supplying construction materials. The average rate of unemployment in the construction industry is significantly higher than the average based on the overall labor force..."
>
> "While general tax cuts stimulate the economy, the effect of the stimulation is diffused throughout all segments of the economy. The committee believes that it is necessary to direct a portion of the economic stimulus specifically toward the housing industry, which has suffered disproportionately from the current economic downturn."
>
> "To provide this needed stimulus, the committee has provided a tax credit in the case of the purchase by an individual taxpayer of a new or used home (but not rental apartment units) which is used by the taxpayer as his principal place of residence. Under the bill, the definition of home includes, but is not limited to, a condominium, mobile home or cooperative housing unit." (At PP 36-7)

The reason for paragraph E of Section 44 is to prevent price increases by a builder trying to take advantage of the tax credit. If a unit is being offered for sale at $40,000.00, paragraph E prevents the builder from raising the price to $41,000.00, and informing the buyer that the buyer's effective purchase price is only $39,000.00 because of a $2,000.00 tax credit. Paragraph E is a legislative effort to insure that the buyer obtains the full benefit of the tax credit and does not share it with the seller. Section 44 was passed to prevent price increases rather than price reductions. What Baker-Firestone did was to reduce prices, not increase them. Baker-Firestone reduced prices on unsold units in order to sell them more rapidly. Had sales been better at the prices that plaintiffs-appellants paid for their units, then the defendants-appellees probably would not have offered an abatement of carrying charges.

Suppose a builder is building a development of 10 one-family homes, each one being the same model. Assume that all of the homes are offered for sale for $50,000. The builder contracts to sell, and does sell, 9 of the homes for $50,000, but is unable to sell the last at that price. Is Section 44 intended to forbid the builder from selling his last unit at less than $50,000? If the seller does sell at less than $50,000, does he owe a refund to the other 9 purchasers? If the builder refuses to give a refund to the other 9 purchasers, do the first 9 purchasers lose their tax credit

under Section 44? There is absolutely nothing in the code, the regulations or the guidelines which leads to an affirmative answer to any of the questions in this paragraph. If the builder had offered all the units for sale at $50,000 and sold the first 9 at that price without ever having offered those 9 for sale at lower price, then Section 44 should apply. Those 9 buyers purchased "specified residences" offered for sale at "specified prices", and those 9 units were never offered at lower prices.

The position of the plaintiffs-appellants would deter the sale of the tenth unit discussed in the above paragraph, while defendants-appellees' position would facilitate the sale since the seller could reduce the price on the tenth unit.

Imagine the chaos for a builder of a large development of new residences. The builder prices his residences at a price which he supposes buyers will accept. Suppose he over-prices the units or the economy turns sluggish. His choice is to reduce prices or else risk not selling his units. Plaintiffs-appellants argue that if the builder reduces his prices, he now owes rebates. If 60 of 100 units have been sold, should a price reduction of $2,000.00 per unit require the builder to rebate $120,000.00? Or must the builder take all uncontracted for units off the market, pay all carrying costs, including taxes and mortgages, and wait until he closes on all outstanding contracts before he can again offer units for sale? If the answer is yes, as plaintiffs-appellants

contend, then this Court would have to construe Section 44 as being totally contrary to the intent of the legislation.

CONCLUSION

Viewed in terms of statutory purpose, Baker-Firestone acted in complete accordance with the statute. Viewed from a literal and technical reading of the statutes and regulations, Baker-Firestone followed the law to the letter. The units that plaintiffs-appellants purchased were offered at one price only, and plaintiffs-appellants contracted to purchase them at that price. The prices at which plaintiffs-appellants purchased their units were the lowest prices that those units were ever offered for sale. The advertisement that appeared after the plaintiffs-appellants contracted to purchase was not an advertisement to sell the units already under contract. The words of plaintiffs-appellants' brief make this clear. On page 6 of their brief the plaintiffs-appellants assert that they"purchased their respective residential units on the basis of the models which they were shown and the various prices for the respective models." On page 8 they correctly state that "defendant, Baker-Firestone, Inc., did offer, by advertisement, to sell other residential units...". (Underlining is defendants-appellees')

To agree with the plaintiffs-appellants and their argument would be to read into the statute and regulations language that does not exist, and to take the purpose of the statute, which is to encourage sales, and to make a sham of the purpose.

Respectfully submitted,

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